8-14-2013

Papse v. State Appellant's Reply Brief Dckt. 39861

Livingston Papse SR. 17502
Full Name/Prisoner Name

SICI N.D.
Box 8509
Boise, Id. 83707
Complete Mailing Address

Plaintiff/Defendant
(circle one)

Idaho Court of Appeals

Livingston Papse Sr. 17502)
Plaintiff/Petitioner,)
(Full name and prisoner number.)
)
vs.)
)
State of Idaho)
)
)
Defendant/Respondent(s),)
(Full name(s). Do not us et. al.))
)

Docket No. 39861-2012
CASE NO. Bannock County
Po. 2009-4955

Appellant's Brief.
with exhibits
(Reply)

COMES NOW Livingston Papse, SR, Plaintiff/Defendant (circle one) in the above entitled

I am assisting (Papse) only as a layman at law, I have no education in law. So in essence (Papse) nor myself have proper education skills. The att. Silvy was appointed, and was so ineffective he was unable to keep the record stright. There are (3) issues being brought in this motion or brief (1) Mis-Conduct of the Prosicutor. - 1

Briefs -pg. 1057

Revised 10/24/05

(2) ineffectiveness of counsel and Misconduct (3) plain error displayed by the Court in its Ruling at all.

(1) The Prosicution ranting on with 3 large paragraphs or 23 Lines of Prosicution after elisiting a contract from (Mr. Papse) in the form of 2+2 Once a plea agreement or contract has been signed, and or acknoledged it forcloses any or all prosicution. Or any statement outside or not in the contract. The Prosicution always being Referenced to by the Court as being the State, Then article one, section 10 U.S. const. and article one Section 16 Idaho Const. The entice ment would Fall under, Idaho const. Section 4; Nor to permit any person, organization, or association to directly or indirectly aid or abet, "Counsel or advise" any Person, or any crime

(2) ineffectiveness of counsel allowing the prosicution to continue to prosicute "without any Objection" after enticing or assisting the Prosicution in Plea negotiations, (Papse) did not have the education or knowledge to bring Forth a plea negociations of his own accord freely or otherwise indicating that his plea was not voluntarily given but only by entice ment, and coersion by counsel and the prosicutor, as counsel stated it took him twice as long to entice (Papse) to sign the agreement. (exhibit 4) Counsel failing to follow thru with (Papse's) Motion to obtain Records From I.D.O.C. That would have shown

That Papse's education in the written and or spoken English Language was not substatial enough for him to make these decisions once again showing deficient counsel (Reference Exhibit 5) signed and dated 12th day of march, 2012: There was not a Voluntary Guilty Plea. Someone with a 5th grade education or less cannot comprehend the implications placed on them by the actions of his counsel or the prosicution.

(3) Plain error by the court in that the court did note the Misconduct of the Prosicution and the inaction of defense counsel and at this point "discretion would have directed him to recuse instead of following Prosicutions Underhanded way of breaching his contract with (Papse)

In Referencing (1)+(2) The Prosicution always referenced by being called "The State" did impair the contract that was enticed, coersed, or otherwise by the State:

A Plea agreement is contractual in nature and must be measured by contract law standards. State v. Lampion, 148 Idaho 367, 376, 223 P.3d 750, 759 (2010)

U.S. Trust co. of New york v. New Jersey, 431 U.S. 1 (1977) 97 S.Ct. 1505, 52 L.Ed.2d 92: On appeal the U.S. S.Ct. Mr. Justice Blackmun, held that the contract clause prohibited the retroactive repeal of the 1962 "covenant". [Papse did have a covenant with the State and by Prosicuting 25to the Brei-

Signing of the plea agreement the prosecution did breach the covenant or contract by continueing to prosicute in the name of State Impairing it.

Deposit Bank of Frankfort V. Board of Council men of City of Frank Fort. 191 U.S. 499 (1903) 24 S.Ct. 154, 48 L.Ed 276: A final decree of a Fed. Ct. enjoining the collection of certain Taxes, and adjudging that an irrevocable contract of exemption from Taxation which under the Fed. Const. cannot be impaired by subsequent legislation, was constituted by laws Ky. 1885-86, pp. 140, 144-147, 201. C. 1233. which "decree" rests upon the effect as res judicata:

New Hampshire V. Maine, 532 U.S. 742 (2001) 121, S.Ct. 1808, 149 L.Ed.2d 968, 01 C.D.O. Daily Op. Serv. 4303: The U.S. S.Ct. Justice Ginsburg, held that under the doctrine of judicial estopple, New Hampshire was equitably barred from asserting contrary to its position in 1970's Litigation.

[And so the State Pros. would also be barred due to the position it established in coersing the Plea agreement and by contract law was, or is required to stand by its position taken upon signing the agreement which should have estopped any further prosicution, of any type after signing the plea agreement.]

Early V. Packer, 537 U.S. 3 (2002) 123 S.Ct. 362, 154 L.Ed 2d 263, 71 USLW 3312, 71 USLW 3307: The S.Ct. held that State CT. determination that Trial court's comments to deadlocked Jury and individual juror were not coersive was not contrary to clearly established Fed law or unreasonable. West held

Note: (1) State-Court decision is "contrary to" S. Ct.'s clearly esta-
blished precedents warranting Federal habeas relief, if it Appl-
ies rule that contradicts governing law set forth in S. Ct.
cases or if it confronts set of facts that are materially
indistinguishable from decision of S.Ct. and nevertheless ar-
rives at result different from precedent. 28 U.S.C.A. § 2254
(d). 3,917 cases cite this headnote.
(2) State Court is not required to cite S.Ct. cases, or even be
aware of them, to avoid its decision being "contrary to"
S.Ct. precedent, as would warrant Fed. habeas relief, so long
as neither reasoning nor result of state-ct. decision
contradicts S.Ct. cases. 28 U.S.C.A. § 2254(d): 4196 cases
cite this headnote
(4) State-Ct.

Davis v. Alaska, 415 U.S. 308, 39 L.Ed.2d 347, 94 S.Ct.
1105 (1974) Counsel may be found ineffective for failure to
subject pros. to meaningful adversarial challenge. The
Ct. stated that the main and essential purpose of the
Sixth Amend. right to confrontation is to secure the
opportunity of cross-examination.

Strickland v. Washington, 466 U.S. 668, 80 L.Ed.2d 674, 104
S.Ct. 2052 (1984): Ineffective assistance of counsel claims
must meet the Two-Pronged Test of (1) Counsel's performance fell
below an objective standard of reasonableness! and (2)
Counsel's deficient performance prejudiced the def.'s
resulting in an unreliable or fund mentally unfair out
come of the proceedings.

U.S. V. Baldacchino, 762 F.2d 170 (1st. cir 1985) Santobello V. New York, 404 U.S. 257, 30 L.Ed.2d 427, 92 S.Ct. 495 (1971)

The S.Ct. has recognized that a plea bargain agreement must be attended by safeguards to insure the def. what is reasonably due in the circumstances.

U.S. V. Chick, 109 F.3d 624 (9th Cir. 1997) District Ct. has broad discretion in fashioning remedy for Gov's breach of plea agreement:

U.S. V. Goings, 200 F.3d 539 (8th cir 2000) where it is clear that the Gov. violated the terms of a plea bargain, the def. is typically given the option of withdrawing his Guilty plea or demanding specific performance.

U.S. V. Akins, 243 F.3d 1199 (9th Cir. 2001) Because a guilty plea serves as a conviction and relieves the State of its burden of proof in a Crim. case, ensuring the validity of the plea is of vital importance.

U.S. V. Quach, 302 F.3d 1096 (9th Cir. 2002) The Ct. of Appeals construes ambiguities in a plea agreement in favor of the def.

U.S. V. Davis, 428 F.3d 802 (9th Cir. 2005) Although def. has burden of demonstrating fair and just reason for withdrawal of Guilty plea such standard is applied liberally;

Trussell V. Bowersox, 447 F.3d 588 (8th cir 2006) A breach of a plea agreement violates def's due process rights.

[In conclusion (Papers) plea agreement was breached by the Prosicution and the court for allowing such an atrossity to happen in the court.]

What Does (Papse) WaNT

1 1- An order For specific performance of pled Agreement.

2 2- Change of Venue as well as different Judge.

3 3- Or Vacate Judgement and have a Jury Trial also

4 in Front of a different Judge,

5 4- Leaving it open For civil actions

6 5- Possibly complete Vacation

7

Respectfully submitted this 12th day of August 2013.

SUBSCRIBED AND SWORN (or affirmed)
before me this 12 day of August, 2013

Notary Public for Idaho
My Commission Expires 2-7-15

Livingston Papse Sr
Plaintiff/Defendant (circle one)

CAROLYN PUCKETT
NOTARY
PUBLIC
STATE OF IDAHO

CERTIFICATE OF MAILING

I HEREBY CERTIFY that on the 12th day of August, 2013, I mailed a true and correct copy of the Appellants brief via prison mail system for processing to the U.S. mail system to:

Deputy Attorney General crim. Div.
P.O. Box 83720
Boise, Id. 83720-0010

Clerk of Cts, Ct of Appeals
Box 83720, Boise, Id. 83720-0101

Livingston Papse Sr
Plaintiff/Defendant (circle one)

Exhibit D) cont.

requested the court to consider placing Papse on probation. (Sentencing Tr., p.31, L.25 – p.32., L.3.[4]) In response, the prosecutor argued:

> Yeah, I think this presentence pretty much speaks for itself when you look at that prior record. I was just looking through them, and I guess what concerns me the most is that his crimes have not slowed down in the past 30, 40 years. In the sixties he had four crimes, one of which was a DUI; in the seventies, three, two of which were a felony; in the eighties, four crimes, three felonies; in the nineties three crimes, but no felonies; and then you look at 2000, and he's got as many or more in the decade beginning in 2000 than he does in any of those other decades: Sixties, seventies, eighties, nineties. The four prior decades prior to 2000, he's got more crimes that he's committed so far this decade.
>
> So Mr. Papse is not slowing down. He might be 60 years old, but his criminal record is continuing on a rapid pace. So I think in the factors that the Court needs to consider in imposing a sentence, I think that protecting society is most important. And, obviously, [defense counsel] alluded to that in his comments.
>
> So although Mr. Papse might be hoping for probation today, I think that prison is the only alternative in this case. So it's, I guess, with great enthusiasm today that I come before the Court and recommend to the Court a four-year prison sentence with those first two years fixed.

(Sentencing Tr., p.32, L.13 – p.33, L.15.) Following the prosecutor's sentencing recommendation, defense counsel argued:

> Well, that was enthusiasm from the part of the prosecutor, and I –
>
> ...
>
> Well, it's just that, you know, in the course of coming up with a plea agreement, as I'm sure that the Court is aware, when we get a recommendation from the prosecutor, we hope that it at least would be something other than an argument for not taking that recommendation and then giving it.

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[4] The transcript of the sentencing hearing (Sentencing Tr.) was attached to Papse's affidavit in support of his post-conviction petition and appears at pages 20 through 24 of the clerk's record.

EXHIBIT TWO (2)

IN THE COURT OF APPEALS OF THE STATE OF IDAHO

Docket No. 28565

STATE OF IDAHO,	)	
	)	**2003 Opinion No. 38**
Plaintiff-Respondent,	)	
	)	**Filed: May 12, 2003**
v.	)	
	)	**Frederick C. Lyon, Clerk**
JAMES MURPHY KENNEDY,	)	
	)	
Defendant-Appellant.	)	
	)	

Appeal from the District Court of the Fourth Judicial District, State of Idaho, Ada County. Hon. Deborah A. Bail, District Judge.

Judgment of conviction and unified sentence of seven years, with a minimum period of confinement of two years, for trafficking in methamphetamine by attempted manufacture, affirmed in part, vacated in part, and remanded.

Molly J. Huskey, State Appellate Public Defender; Paul S. Sonenberg, Deputy Appellate Public Defender, Boise, for appellant.

Hon. Lawrence G. Wasden, Attorney General; Ralph Reed Blount, Deputy Attorney General, Boise, for respondent.

PERRY, Judge

James Murphy Kennedy appeals from the judgment of conviction entered upon his plea of guilty to trafficking in methamphetamine by attempted manufacturing. We affirm in part, vacate in part, and remand.

Kennedy was charged with conspiracy to traffic in methamphetamine by manufacturing. In the midst of trial, Kennedy entered into a plea agreement with the state whereby he agreed to plead guilty to trafficking in methamphetamine by attempted manufacturing. I.C. § 37-2732B(a)(3). Defense counsel summarized the plea agreement by stating that "Kennedy will plead to Count 1, an attempt to manufacture, the state will recommend two years fixed required by the statute, will not make a recommendation on an indeterminate, leave that in the judge's discretion." The district court thereafter accepted Kennedy's guilty plea.

At the sentencing hearing, the prosecutor acknowledged the plea agreement. After discussing the facts of the case, Kennedy's longstanding substance abuse problem, and Kennedy's criminal history, the prosecutor made the following recommendation:

> I think the two years fixed, Judge, is appropriate, and I think a substantial period of indeterminate time is warranted in this defendant's case. Not necessarily, Judge, so that he can serve a lot more time in the penitentiary, but obviously given his history, given the serious nature of this offense and his activities in this offense, as well as his attitude and disposition in the presentence investigation, he's an individual for which I think that the Department of Correction needs to have a substantial period of supervision of this man.

Kennedy did not object to the prosecutor's comments. The district court imposed a unified seven-year sentence, with a minimum period of confinement of two years.

Kennedy now appeals, asserting that the prosecutor breached the plea agreement by recommending that the indeterminate portion of Kennedy's sentence be substantial. Kennedy seeks specific performance of the plea agreement, arguing that his case should be remanded for resentencing before a different district judge.

We note at the outset that Kennedy did not object to the prosecutor's recommendation of a substantial indeterminate sentence, nor did he move to withdraw his guilty plea. Ordinarily, this Court will not address an issue not preserved for appeal by an objection in the trial court. *State v. Rozajewski*, 130 Idaho 644, 645, 945 P.2d 1390, 1391 (Ct. App. 1997). However, we may consider fundamental error in a criminal case, even though no objection was made below. *See id.* Fundamental error has been defined as error which goes to the foundation or basis of a defendant's rights, goes to the foundation of the case or takes from the defendant a right which was essential to his or her defense and which no court could or ought to permit to be waived. *State v. Babb*, 125 Idaho 934, 940, 877 P.2d 905, 911 (1994). Breach of a plea agreement by the state is fundamental error and, therefore, the failure to seek relief in the trial court does not preclude a defendant from raising the issue for the first time on appeal if the record is adequate for that purpose. *State v. Fuhriman*, 137 Idaho 741, 744, 52 P.3d 886, 889 (Ct. App. 2002); *State v. Brooke*, 134 Idaho 807, 809, 10 P.3d 756, 758 (Ct. App. 2000). Here, the transcript of the plea hearing sufficiently establishes the terms of the plea agreement, and we will consequently address Kennedy's claim of breach.

When a plea rests in any significant degree on a promise or agreement of the prosecutor, so that it can be said to be a part of the inducement or consideration, such promise must be

Exhibit 2

fulfilled. *Santobello v. New York*, 404 U.S. 257, 262 (1971). This principle is grounded in the Due Process Clause and the well-established rule that, to be valid, a guilty plea must be both voluntary and intelligent. *Mabry v. Johnson*, 467 U.S. 504, 508-09 (1984). *See also State v. Rutherford*, 107 Idaho 910, 913, 693 P.2d 1112, 1115 (Ct. App. 1985). Thus, when the prosecution breaches its promise with respect to a plea agreement, the defendant pleads guilty on a false premise and is entitled to relief. *Mabry*, 467 U.S. at 509; *State v. Seaman*, 125 Idaho 955, 957, 877 P.2d 926, 928 (Ct. App. 1994). As a remedy, the court may order specific performance of the plea agreement or may permit the defendant to withdraw the guilty plea. *Santobello*, 404 U.S. at 263; *Seaman*, 125 Idaho at 957, 877 P.2d at 928; *Rutherford*, 107 Idaho at 916, 693 P.2d at 1118.

Under the circumstances presented in the instant case, we conclude that Kennedy has established that the state breached the plea agreement. Pursuant to the agreement, the prosecutor promised not to make a recommendation regarding the indeterminate portion of Kennedy's sentence. Although the prosecutor did not recommend a specific indeterminate length, this Court notes that the agreement precluded the prosecutor from making *any* recommendation relative to the indeterminate term, including a recommendation that the indeterminate term of Kennedy's sentence be "substantial."

Although Kennedy appeals from his judgment of conviction, he is not requesting to withdraw his guilty plea. Rather, Kennedy seeks specific performance of the plea agreement and resentencing before a different district judge who will not have heard the prosecutor's improper recommendation. Because Kennedy has requested relief in the form of specific performance, and because he has shown that he is entitled to such relief, we conclude that specific performance of the plea agreement is an appropriate remedy in this case. *See Rutherford*, 107 Idaho at 916, 693 P.2d at 1118. Therefore, we affirm Kennedy's judgment of conviction for trafficking in methamphetamine by attempted manufacturing, but we vacate Kennedy's sentence and remand the case for resentencing before a different district judge.

Chief Judge LANSING and Judge GUTIERREZ, **CONCUR.**

IN THE COURT OF APPEALS OF THE STATE OF IDAHO

Docket No. 38791

KIRK JULLIARD GOSCH,

Petitioner-Appellant,

v.

STATE OF IDAHO,

Respondent.

2012 Opinion No. 47

Filed: September 5, 2012

Stephen W. Kenyon, Clerk

Appeal from the District Court of the First Judicial District, State of Idaho, Kootenai County. Hon. Benjamin R. Simpson, District Judge.

Judgment dismissing petition for post-conviction relief, vacated and remanded.

Sara B. Thomas, State Appellate Public Defender; Sarah E. Tompkins, Deputy Appellate Public Defender, Boise, for appellant. Sarah E. Tompkins argued.

Hon. Lawrence G. Wasden, Attorney General; Kenneth K. Jorgensen, Deputy Attorney General, Boise, for respondent. Kenneth K. Jorgensen argued.

MELANSON, Judge

Kirk Julliard Gosch appeals from the district court's judgment dismissing his petition for post-conviction relief. For the reasons set forth below, we vacate and remand.

I.

FACTS AND PROCEDURE

Gosch was found guilty by a jury of manufacturing a controlled substance, I.C. § 37-2732(a); possession of marijuana with intent to deliver, I.C. § 37-2732(a); and possession of marijuana in excess of three ounces, I.C. § 37-2732(e). Gosch filed a petition for post-conviction relief, asserting that he received ineffective assistance of counsel because his trial counsel provided erroneous advice as to the potential consequences of filing an appeal. At an evidentiary hearing on this claim, Gosch asserted that he also received ineffective assistance of counsel because he asked counsel to file an appeal in his underlying criminal case, but no appeal was ever filed. The state did not object to the presentation of this additional claim at the evidentiary

Exhibit 3

hearing, the parties argued the merits, and the district court considered the claim. In the district court's findings of fact and conclusions of law in support of the judgment dismissing Gosch's petition, the district court determined that Gosch's claims of ineffective assistance of counsel failed. Gosch appeals.

II.
ANALYSIS

Gosch argues that the district court erred when it dismissed his petition for post-conviction relief because he demonstrated that he received ineffective assistance of counsel based upon his trial counsel's failure to file a notice of appeal in his underlying criminal case despite Gosch's unequivocal request that counsel do so.[1] Thus, Gosch asserts that his case must be remanded to the district court for entry of an amended judgment of conviction to allow him to perfect a timely appeal.

Post-conviction proceedings are civil in nature and therefore the petitioner must prove the allegations by a preponderance of the evidence. *McKinney v. State*, 133 Idaho 695, 699-700, 992 P.2d 144, 148-49 (1999). On review, the appellate court will not disturb the lower court's factual findings unless the factual findings are clearly erroneous. *Id.* at 700, 992 P.2d at 149. The credibility of the witnesses, the weight to be given to their testimony, and the inferences to be drawn from the evidence are all matters solely within the province of the district court. *Peterson v. State*, 139 Idaho 95, 97, 73 P.3d 108, 110 (Ct. App. 2003). The appellate court exercises free review of the district court's application of the relevant law to the facts. *Dunlap v. State*, 141 Idaho 50, 56, 106 P.3d 376, 382 (2004).

A claim of ineffective assistance of counsel may properly be brought under the post-conviction procedure act. *Murray v. State*, 121 Idaho 918, 924-25, 828 P.2d 1323, 1329-30 (Ct. App. 1992). To prevail on an ineffective assistance of counsel claim, the defendant must show that the attorney's performance was deficient and that the defendant was prejudiced by the deficiency. *Strickland v. Washington*, 466 U.S. 668, 687-88 (1984); *Hassett v. State*, 127 Idaho 313, 316, 900 P.2d 221, 224 (Ct. App. 1995). To establish a deficiency, the petitioner has the

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[1] Gosch does not challenge the district court's determination that Gosch's claim that he received ineffective assistance of counsel because his trial counsel provided erroneous advice as to the potential consequences of filing an appeal failed.

burden of showing that the attorney's representation fell below an objective standard of reasonableness. *Aragon v. State*, 114 Idaho 758, 760, 760 P.2d 1174, 1176 (1988). To establish prejudice, the petitioner must show a reasonable probability that, but for the attorney's deficient performance, the outcome of the trial would have been different. *Id.* at 761, 760 P.2d at 1177.

The district court found that, after the jury rendered its verdict, Gosch left the courthouse with his counsel in a confused and stressful state and informed counsel that he wanted to "appeal everything." The district court also found that, upon making such request, counsel directed Gosch to contact counsel's office the next day by scheduling an appointment because counsel wanted to allow Gosch time "to digest the verdict, and more clearly articulate exactly what he wanted to appeal." The district court found that, thereafter, Gosch never scheduled an appointment and never spoke with counsel regarding an appeal. Additionally, the district court found that counsel made several unsuccessful attempts to contact Gosch following his request to "appeal everything," including an attempt to make the public defender's investigator available to Gosch prior to his sentencing. The district court also found that Gosch was notified at sentencing of his right to appeal.

The district court correctly noted that, pursuant to *Beasley v. State*, 126 Idaho 356, 361-62, 883 P.2d 714, 719-20 (Ct. App. 1994), a defendant who proves that he or she was denied an appeal because counsel did not file an appeal as requested states a meritorious claim for ineffective assistance of counsel because the loss of the right to appeal is sufficient prejudice, in and of itself, to support such claim. In that case, Beasley filed a petition for post-conviction relief, asserting he received ineffective assistance of counsel because counsel failed to file an appeal from Beasley's judgment of conviction. Beasley and his trial counsel testified at the hearing on his petition. Following the hearing, the district court denied relief and dismissed the petition, concluding that Beasley failed on his claim to show deficient performance by counsel or prejudice sufficient to satisfy the two-pronged standard for ineffective assistance derived from *Strickland*. *Beasley*, 126 Idaho at 359, 883 P.2d at 717.

On appeal, this Court noted that it was undisputed that Beasley advised his counsel of his desire to appeal his conviction and that the record clearly showed that counsel understood Beasley desired to appeal. We determined that the loss of the opportunity to appeal due to counsel's failure to file an appeal when a criminal defendant requested that counsel do so was sufficient prejudice to support a claim of ineffective assistance of counsel. *Beasley*, 126 Idaho at

Exhibit 3

362, 883 P.2d at 720. Having determined that Beasley's counsel either neglected or refused to file an appeal despite Beasley's request, we concluded that deficient performance of counsel deprived Beasley of his opportunity to appeal and that prejudice was presumed from such performance. *Id.* Accordingly, Beasley's judgment of conviction had to be vacated and reentered so Beasley could perfect a timely appeal. *Id.*

Here, at the hearing on Gosch's petition, the district court stated:

> I think this case is distinguishable from *Beasley* in the sense that Mr. Gosch was afforded an opportunity to discuss an appeal. He was invited to make an appointment to discuss it. And he failed to follow up on multiple opportunities to do so. The Court finds that based upon the distinguishing facts that he did not make a request after the judgment was filed, he did not make an appointment after he was invited to do so, that the *Beasley* rule doesn't apply. There was no binding request for an appeal to be filed. Accordingly, the petition is denied.

In the written conclusions of law, the district court stated that *Beasley* was distinguishable from Gosch's case "because *Beasley* requested an appeal of his conviction, and the record clearly showed that trial counsel, and the public defender who assumed representation of Beasley after entry of his judgment of conviction, understood that Beasley desired to appeal."

Relying upon *Sanders v. State*, 117 Idaho 939, 792 P.2d 964 (Ct. App. 1990); *State v. Dillard*, 110 Idaho 834, 718 P.2d 1272 (Ct. App. 1986); and *Flores v. State*, 104 Idaho 191, 657 P.2d 488 (Ct. App. 1983), the district court properly concluded that its decision should be based on whether Gosch's desire to appeal was adequately communicated to his counsel *and* whether counsel's failure to file an appeal resulted from deficient performance that deprived Gosch of the opportunity to appeal. The district court then reiterated that, in this case, Gosch made a single request to "appeal everything" during a time of confusion and stress directly after the jury rendered its verdict and before a sentence or judgment had been entered. The district court again noted that, while Gosch's counsel directed him to set up an appointment to discuss a potential appeal, Gosch did not thereafter contact counsel or respond to attempted correspondence from counsel and never again evidenced a desire to appeal. The district court determined that Gosch's request to appeal was not ignored by counsel but, rather, Gosch ignored counsel. The district court also determined that it was not counsel's inaction that caused Gosch to not appeal, but Gosch's own inaction that resulted in failure to file an appeal. Thus, the district court concluded that Gosch's request was not fully and fairly communicated to counsel so as to warrant a

conclusion that it was counsel's ineffective assistance that deprived Gosch of the opportunity to appeal. The district court finally concluded that counsel reasonably believed Gosch had abandoned any desire to file an appeal because Gosch ignored counsel's repeated attempts to communicate with Gosch regarding an appeal. Accordingly, the district court entered a judgment dismissing Gosch's petition.

It is undisputed that, after the jury rendered its verdict, Gosch requested that counsel "appeal everything." It is also undisputed that, thereafter, Gosch's counsel never filed an appeal. We conclude that the district court erred in determining that Gosch's case is distinguishable from *Beasley* such that *Beasely* does not apply in this case because Gosch requested that his counsel "appeal everything" after the jury rendered its verdict as opposed to after sentencing and entry of judgment. Specifically, I.C. § 19-2317 provides:

> When the verdict given is such as the court may receive, the clerk must immediately record it in full upon the minutes, read it to the jury, and inquire of them whether it is their verdict. If any juror disagree, the fact must be entered upon the minutes and the jury again sent out; but if no disagreement is expressed, the verdict is complete, and the jury must be discharged from the case.

A legal conviction occurs when a verdict or plea of guilty is accepted by the court. *State v. Wagenius*, 99 Idaho 273, 278, 581 P.2d 319, 324 (1978). Idaho Appellate Rule 17(e)(2) provides that a notice of appeal filed from an appealable judgment or order before formal written entry of such document shall become valid upon the filing and placing of the stamp of the clerk of the court on such appealable judgment or order, without refiling the notice of appeal. Therefore, Gosch's attorney could have filed an appeal after the jury rendered its verdict, but before entry of judgment, and such appeal would have become valid upon the filing and placing of the stamp of the clerk upon such judgment and without refiling. Thus, it is of no consequence that Gosch's request that counsel file an appeal occurred after the jury rendered its verdict as opposed to after sentencing and the entry of judgment.[2]

The district court also erred in ruling that *Beasley* does not apply in this case because the record does not show Gosch's counsel did not understand that Gosch desired to appeal. At the hearing on Gosch's petition, Gosch's counsel testified that, after the jury rendered its verdict and

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[2] We do not address a request to appeal a conviction made prior to the jury reaching a verdict.

counsel left the courthouse with Gosch, he requested that counsel "appeal everything." Thus, the record shows that Gosch's counsel understood that Gosch desired to appeal.

Similarly, the district court erred in ruling that Gosch's request to file an appeal was not fully and fairly communicated to counsel because, after making such request, Gosch did not schedule an appointment with counsel as directed and did not respond to counsel's attempted correspondence prior to sentencing to discuss a potential appeal. This case is unlike *Sanders* where this Court affirmed the district court's dismissal of Sanders' petition after the district court, when faced with conflicting evidence about whether Sanders ever requested an appeal, made a credibility determination and concluded that Sanders failed to communicate his desire to appeal to counsel. *Sanders*, 117 Idaho at 940-41, 792 P.2d at 965-66. Here, as noted above, it is undisputed that, after the jury rendered its verdict, Gosch requested that his counsel "appeal everything" and the record shows that counsel understood that Gosch desired to appeal.

While the district court concluded that Gosch's failure to schedule an appointment with counsel as directed and failure to respond to correspondence from counsel after he requested that counsel "appeal everything" excused counsel from filing an appeal, such conclusion goes against this Court's holding in *Beasley*. Specifically, we held that if counsel either neglects or refuses to file an appeal despite a criminal defendant's request to do so, counsel is deficient. *Beasley*, 126 Idaho at 362, 883 P.2d at 720. Whether counsel was able to make contact with Gosch after the jury rendered its verdict and Gosch requested that counsel "appeal everything," absent an express withdrawal of such request, counsel was required to file an appeal.[3]

The district court's conclusion that lack of contact with Gosch after he requested that counsel "appeal everything" excused counsel from filing an appeal is also contrary to the holding of the United States Supreme Court that:

> We have long held that a lawyer who disregards specific instructions from the defendant to file a notice of appeal acts in a manner that is professionally unreasonable. *See Rodriquez v. United States*, 395 U.S. 327, 89 S. Ct. 1715, 23 L. Ed. 2d 340 (1969); cf. *Peguero v. United States*, 526 U.S. 23, 28, 119 S. Ct. 961,

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[3] We also note that Gosch appeared at sentencing with counsel. Gosch's counsel testified at the hearing on Gosch's petition for post-conviction relief that, just prior to sentencing, counsel reviewed the presentence investigation report with Gosch but did not discuss the possibility of an appeal. Further, Gosch's counsel testified that she did not discuss the possibility of an appeal with Gosch after sentencing and entry of the judgment of conviction.

Exhibit 3

> 143 L. Ed. 2d 18 (1999) ("[W]hen counsel fails to file a requested appeal, a defendant is entitled to [a new] appeal without showing that his appeal would likely have had merit"). This is so because a defendant who instructs counsel to initiate an appeal reasonably relies upon counsel to file the necessary notice. Counsel's failure to do so cannot be considered a strategic decision; *filing a notice of appeal is a purely ministerial task*, and the failure to file reflects inattention to the defendant's wishes.

Roe v. Flores-Ortega, 528 U.S. 470, 477 (2000) (emphasis added). Additionally, to require that, after a defendant makes a specific request that counsel file an appeal after the jury renders its verdict, the defendant must schedule an appointment with counsel if directed to do so or respond to attempted correspondence from counsel before such request will be honored permits counsel to condition the filing of an appeal upon such requirements. This goes against precedent indicating that the decision whether to prosecute an appeal rests with the defendant. *See Mata v. State*, 124 Idaho 588, 593, 861 P.2d 1253, 1258 (Ct. App. 1993).

Again, it is undisputed that in this case, after the jury rendered its verdict in Gosch's underlying criminal case, Gosch requested that counsel "appeal everything." The record shows that Gosch's counsel understood that Gosch desired to appeal and, thereafter, never filed an appeal. We hold that, when a defendant makes an unequivocal request that counsel file an appeal after the jury renders its verdict, counsel has an obligation to file such appeal unless the defendant thereafter expressly communicates to counsel that he or she no longer wishes to pursue the appeal. Here, there is no evidence that Gosch did so.[4] Thus, because Gosch's counsel did not file an appeal despite Gosch's unequivocal request that counsel do so after the jury rendered its verdict and Gosch did not expressly withdraw his request, we conclude that deficient performance of counsel deprived Gosch of the opportunity to appeal and that prejudice is presumed from such performance. Therefore, the district court erred by dismissing Gosch's petition for post-conviction relief. Gosch's judgment of conviction must be amended to allow Gosch to perfect a timely appeal.

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[4] We recognize that, after an appeal is filed, an appellant might abandon his or her desire to prosecute an appeal and that, presumably, such abandonment could be inferred from conduct such as failure to communicate with counsel. We need not decide that question here.

Exhibit B

III.

CONCLUSION

Gosch demonstrated that he received ineffective assistance of counsel based upon his counsel's failure to file a notice of appeal in his underlying criminal case. Accordingly, we vacate the district court's judgment dismissing Gosch's petition for post-conviction relief and remand to the district court for entry of an amended judgment of conviction consistent with this opinion. Costs, but not attorney fees, are awarded to Gosch as the prevailing party on appeal.

Chief Judge GRATTON and Judge GUTIERREZ, **CONCUR.**

you want me to know about before I decide whether to accept your plea?

The Defendant: I don't think so, Your Honor.

The Court: Do you still wish to plead guilty?

The Defendant: Yes, sir.

The Court: Very well, sir. Based on that record, I'm satisfied that your plea of guilty is given knowingly, voluntarily, and intelligently. I direct clerk to enter your guilty plea of record, and based on your plea, I will find you guilty of driving under the influence of alcohol and/or drugs, a repeated offense, as set out in the December 6, 2007, information.

Q. Thank you, Mr. Dewey. I'll go back to the transcript in just a second, but there's a couple of other things that I want to talk about specifically regarding Mr. Papse's allegations.

Did you at any time tell your client at the time, Mr. Papse, that the plea agreement included the judge being on board, so to speak?

A. No. I never did.

Q. What did you tell him, if anything, about the judge's role in the plea agreement?

A. What I told him was that the plea agreement was an agreement on the part of the prosecutor as to what he would recommend. I told hir that judge is not bound by that, that he can do whatever he wants to. That's why he gets to wear the black robe.

Q. Isn't it true that, in fact, the judge did tell him that at the time of the change of plea as read into the record earlier?

A. That's true.

Q. Did you tell him anything else about what the judge's role in the plea agreement was?

A. I don't believe so.

Q. Was it your -- was it your understanding that Mr. Papse understood that the judge was not bound by the plea agreement?

A. Yes.

Q. Why do you think that he understood that?

A. Well, because I explained to him in detail and the judge later explained it to him as well. I explained to him that plea agreement as far as the two plus two recommendation was just the recommendation of the prosecuting attorney, that it was up to the judge what he did with that

recommendation.

Q. Did he understand those things when you explained them to him as far as you know?

A. Based on his responses that he gave me when we were filling out the agreement and what he did in court, I believe that he understood that.

Q. Now, Mr. Dewey, Mr. Papse makes the assertion that you told him that the plea agreement was contingent upon him answering questions posed by the district court as instructed by the attorney. Do you know what he could be asserting there or what he might be referencing?

A. Well, I did tell him that he had to complete the questionnaire in order for his plea to be accepted.

Q. Is that standard for you to tell your clients?

A. Yes. You have to fill out the questionnaire, and if the questionnaire is not responsive in some regards -- in other words, if you say that it's not voluntarily entered, then the court's not going to the accept it.

Q. So when he says that the plea agreement was contingent upon that, what would that mean?

A. That meant that he had to fill out the

questionnaire and it had to be accepted by the court.

Q. What if it wasn't filled out or accepted by the court?

A. Well, then there would be no plea agreement or no plea of guilty.

Q. Did that happen in this case?

A. No.

Q. He also alleges that his answers during his change of plea were not true and that he parroted and mimicked what his attorney said. Is that your impression of that day?

A. No, it's not. When we filled out the plea agreement we spent, like I said, a considerable amount of time making sure that they were accurate and understood the questions. When he was in court I think that he had some trouble not so much hearing but being able to hear the questions that were being asked. So I just simply went through the questions. You know, when he responded in a way that wasn't consistent with his form on some of the questions, I would talk briefly with him to make sure that he understood it, and when he did, make sure that he changed that response.

Q. Did he change that response in reaction to any type of threat or coercion from you?

EXHIBIT S

FILED
BANNOCK COUNTY
CLERK OF THE COURT
2012 MAR 19 PM 12:11
BY DEPUTY CLERK

Livingston J. Papse SR #17502
Full Name/Prisoner Name

SICI N.D. E
Box 8509
Boise, Idaho 83707
Complete Mailing Address

Plaintiff/Defendant
(circle one)

IN The DISTRICT COURT FOR The 6th Judicial DISTRICT
OF The STATE OF Idaho IN AND FOR The
COUNTY OF BANNOCK

Livingston J. Papse SR #17502
Plaintiff/Petitioner
(Full name and prisoner number.)

vs.

STATE OF Idaho

COUNTY OF BANNOCK
Defendant/Respondent(s),
(Full name(s). Do not us et. al.)

CASE NO. CV-2009-4955-PC

Rule 45 b (2)(3)(4)
MOTION TO SUPENA
records in possession
of I.D.O.C.

COMES NOW Livingston J Papse SR Petitioner Plaintiff/Defendant (circle one) in the above entitled

Forma Pauperos, Pro. Se. To Supena evaluation Records in The control of I.D.O.C. Presently under The care of warden Kirkman and deputy warden Christensen + Johnson SICI Box 8509 Boise, Idaho 83707. Records To be introduced in Response To -1

-pg.

Revised 10/24/05

Exhibit 5

NOTICE OF INTENT TO DISMISS
ONE COPY TO PETITIONER
ONE COPY TO CLERK OF BANNOCK COUNTY
ONE COPY TO PROSICUTOR · BANNOCK COUNTY

Respectfully submitted this 12 day of March 2012.

SUBSCRIBED AND SWORN (or affirmed)
before me this 12th day of March 2012

Notary Public for Idaho
My Commission Expires 10-14-15

Livingston J Papse Sr
Plaintiff/Defendant (circle one)
PETITIONER

CAROLYN PUCKETT
NOTARY
PUBLIC
STATE OF IDAHO

CERTIFICATE OF MAILING

I HEREBY CERTIFY that on the 12 day of March, 2012, I mailed a true and correct copy of the 2 MOTIONS via prison mail system for processing to the U.S. mail system to:

BANNOCK COUNTY Clerk of Court
BANNOCK COUNTY PROSICUTOR
Warden of SICI ATT. GEN.

Livingston J Papse Sr
Plaintiff/Defendant (circle one)
PETITIONER